Supreme Court, U.S.
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No. 05- 50

In The

Supreme Court of the United States

MARIA ANNE KIRKMAN CAMPBELL,
a.k.a. Anne Kirkman Campbell,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE APPEAL WAIVER CLAUSE VIOLATES 18 U.S.C. § 3742(A)?

II. WHETHER THE RECORD REFLECTS THAT THE DEFENDANT WAIVED THE RIGHT TO APPEAL HER SENTENCE, RESTITUTION, AND FINE?

III. WHETHER THE PLEA AGREEMENT IS AMBIGUOUS AS TO WHETHER "SENTENCE" INCLUDES RESTITUTION?

IV. WHETHER THE DISTRICT COURT'S ENHANCEMENTS FOR THE UNDERLYING OFFENSE IN COUNT I UNDER 18 U.S.C. § 1341 VIOLATED THE SIXTH AMENDMENT BECAUSE THE ENHANCEMENTS RESTED ON FACT FINDINGS BY THE JUDGE INSTEAD OF THE JURY?

V. WHETHER THE DISTRICT COURT'S RESTITUTION ORDER, AS APPLIED TO THE DEFENDANT, IS UNCONSTITUTIONAL UNDER *APPRENDI*, *BLAKELY*, AND *BOOKER*?

VI. WHETHER THE DISTRICT COURT ERRED IN RELYING SOLELY UPON HEARSAY IN THIS CASE TO CALCULATE THE VICTIM'S LOSS FOR SENTENCING PURPOSES AND FOR RESTITUTION AND THE FINE?

VII. WHETHER THE DISTRICT COURT ERRED IN CALCULATING RESTITUTION?

VIII. WHETHER THE DISTRICT COURT ERRED IN CALCULATING THE ACTUAL LOSS?

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is not reported. (App. 1). The court denied Dr. Campbell's motion for reconsideration; this order is not reported. (App. 6).

STATEMENT OF JURISDICTION

On April 6, 2005, the Eleventh Circuit held Campbell knowingly and voluntarily waived her right to appeal. The court granted the Government's motion to dismiss and did not address Campbell's sentencing claims. On May 11, 2005, the court denied Campbell's motion for reconsideration. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "(I)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." The following statutory provisions are found in the appendix: 18 U.S.C. § 1341; 18

U.S.C. § 1342; 18 U.S.C. § 3663A; 18 U.S.C. § 3664; and 18 U.S.C. § 3742.

STATEMENT OF THE CASE

A. Nature of Case

Anne Campbell was named in a 21-count indictment that accused her of mail fraud and false statements in connection with a clinical study conducted to obtain FDA approval of Keteck, a drug manufactured by Aventis Pharmaceuticals Inc. (R1-1). Campbell pleaded guilty to one count. (R1-25). Campbell was sentenced to 56 months in prison and ordered to pay $1.5 million in fines and restitution for submitting false information in an antibiotic drug study. (R2-46).

B. Facts

Campbell's written plea agreement with the Government provided in part:

> I. *PLEA AGREEMENT*: The United States and the defendant hereby AGREE to the following:
>
> (a) *Plea*: The defendant will plead guilty to Count One of the Indictment.
>
> (b) *Understanding*: Pursuant to Rule 11(c)(1)(B), Fed. R. Crim. P., and upon the Court's acceptance of the aforesaid plea and entry of judgment on the same, the United States will do the following:
>
> (1) The government recommends that the defendant be given a three-level reduction for acceptance of responsibility. The government further recommends that the defendant be sentenced to the low

> end of the guidelines. The government further reserves the full right of allocution.
>
> * * *
>
> *WAIVER OF RIGHT TO APPEAL*
>
> Defendant's right to an appeal and her right to file a motion pursuant to 28 U.S.C. § 2255 have been explained to her and she understands those rights. As a part of this plea agreement, Defendant knowingly, intelligently, and voluntarily waives right to appeal conviction(s) and sentence, and to challenge conviction and sentence pursuant to 28 U.S.C. § 2255.

(R1-25). Before the District court accepted Campbell's plea, the court engaged in the following:

> THE COURT: The range of punishment which is available for that offense is as follows:
>
> You're subject to a fine of greater – of the greater of not more than $250,000 or two times the gross gain or loss in each count. You're subject to custody in prison time of not more than 5 years for each count and not more than 30 years as to each count if a financial institution was affected.
>
> There is no allegation of that; is that correct?
>
> MR. HENRY: No, sir.
>
> THE COURT: So you would be subject to not more than 5 years as to each count. You are pleading to one of those counts, so it would be 5 years. You would have a supervised release term of not more than 3 years, an assessment fee of $100, restitution will apply, and the United States sentencing guidelines apply as well.

Is the government satisfied the courts explained the range of punishment that's available for that offense?

MR. HENRY: Yes, Your Honor.

THE COURT: Do you understand the range of punishment which is available for the offense against you?

THE DEFENDANT: Yes, sir.

(R4-10-11).

THE COURT: Do you understand you **may** be required to pay restitution in this case? (Emphasis added).

THE DEFENDANT: Yes.

THE COURT: Now, plea agreements are permissible but you and your attorney are obligated to disclose, just like the government's obligated to disclose, the terms of any plea agreement. I have been provided a document which was filed yesterday that's entitled plea agreement and conditions. It appears to have your signature on page eleven. Do you see that? Did you sign that document?

THE DEFENDANT: Yes, sir.

THE COURT: Did you know – had you read the terms of this agreement before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: On page 10, there is something called a Waiver of Right to Appeal. Were you aware that that provision was in there?

THE DEFENDANT: Yes, sir.

> THE COURT: **Waiving your right to appeal any conviction in his case?** (Emphasis added).
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Did you understand it also waived your right to make a post conviction petition under 28 U.S.C. § 2255?
>
> THE DEFENDANT: Yes.

(R4-13-14).

* * *

> THE COURT: I want you to understand this also. Your agreement is with the government, not with the court. I am not bound by any agreement. As a result, I could give you a sentence which is substantially greater or substantially less severe than what is anticipated in that agreement. **And if I choose to do that, that would not constitute grounds for you to move to set aside your guilty plea** (But no mention about right to appeal). Do you understand that?

(R4-14).

Dr. Campbell, a general practitioner, entered into a contract with Aventis Pharmaceuticals to participate as in the study about the safety and effectiveness of Keteck, a new antibiotic to treat upper respiratory infections. (R4-15-16; R3-7).[1] Aventis conducted clinical studies to obtain FDA approval for this new drug. (R4-16; R3-7). Campbell was paid $400 for each volunteer who completed the study for the safety and effectiveness of Keteck. (R4-16; R3-8-9).

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[1] R4 is the transcript of the plea hearing and R3 is the transcript of the sentencing hearing.

The volunteers were to have met certain criteria, including being diagnosed with either community acquired pneumonia, acute exacerbation of chronic bronchitis or acute sinusitis. (R4-17-19; R3-7-9). The contract also called for specific record-keeping requirements. (R4-16,18).

Campbell pleaded guilty to submitting documentation to Avenits and PPD Development LLC, falsely stating that certain people she had seen as study subjects, or volunteers, had participated in and completed the study when they had not. (R4-15,20-28). Campbell was one of over 1,000 physicians nationwide to participate in the study, which wanted approximately 25,000 study subjects. (R4-16). Campbell enrolled 407 people, beginning on November 7, 2001, through March 2002 as study subjects. (R4-16; R3-10).

The district court granted the Government's request that Campbell be held responsible for obstructing justice, and she was given a two point enhancement. (R3-107-08). The maximum sentence Campbell could receive is 60 months. (R3-108). The court sentenced Campbell to 57 months in prison and ordered her to pay a fine of $557,251.22 and to pay restitution in the amount of $925,774.61 to Aventis. (R3-113). The court found that the victim's actual loss was conservatively $278,627.61. (R3-105). This amount was based on $175,450 that was paid to Campbell for the 407 patients. (R3-104). The court agreed that "maybe some (patient studies) were good, maybe some weren't," but the court refused to take into consideration the good studies because the company no longer was able to utilize any of the information they got from her so the information might as well have never been done. (R3-105-07). Aventis reimbursed Campbell $4,283.67 for expense invoices that she had submitted. (R3-106). In addition, Aventis had to pay a laboratory $29,831.78 for the blood

tests that were done on behalf of Campbell, and Aventis sent $69,062.16 worth of drug supplies to Campbell for the use of her patients. (R3-106). The court had real concerns where those medications went because there were a lot of patients in the study that did not get any medication. (R3-106-07). The court then advised:

> THE COURT: All right. **You have the right to appeal the sentence imposed within 10 days if you believe the guidelines have been misapplied or the sentence is otherwise in violation of law. *However, you may waive those rights as part of your plea agreement. If you have entered into a plea agreement which waives some or all of your rights to appeal the sentence,* such waivers are generally enforceable. If you believe the waiver is unenforceable, you can present that theory to the appellate court.**
>
> With few exceptions, any notice of appeal must be filed within 10 days of judgment being entered in your case. If you are unable to pay the cost, you may apply for leave to appeal in forma pauperis and for appointment of counsel. If you are allowed by the court to appeal on appeal in forma pauperis, upon your request the clerk of court will assist you in preparing and filing notice of appeal.
>
> All right. Now, you wanted to talk to me, I assume, about when she should be taken into custody.

(R3-115).

C. Proceedings and Disposition Below

On October 22, 2003, Campbell entered into a written plea agreement to Count One with the Government. (R1-25;

R2-66). Judgment was entered on March 25, 2004. *Id.* A timely notice of appeal was filed on April 2, 2004. (R1-53).

REASONS FOR GRANTING THE WRIT

It is becoming a common practice in federal plea bargains for the Government to include an appeal waiver clause. However, Congress's goal in passing the federal sentencing guidelines was to move the sentencing system in the direction of increased uniformity, a uniformity that does not consist simply of similar sentences for those convicted of violations of the same statute, but consists of similar relationships between sentences and real conduct. *United States v. Booker*, 125 S.Ct. 738, 761 (2004). "The legislative history of § 3742 suggests that appellate review of sentences is available to ensure correct application of the guidelines in order to reduce disparity in sentencing – a primary goal of the entire Sentencing Reform Act of 1984." *United States v. Fuente-Kolbenschlag*, 878 F.2d 1377, 1379 (11th Cir. 1989). "Appellate review under the Guidelines, important as it is for individual defendants, also serves an important public interest in avoiding the sentencing disparities that were seen to be a great problem with the pre-Guideline systems." *United States v. Ready*, 82 F.3d 551, 556 (2nd Cir. 1996).

Appellate review of a defendant's sentence is essential because, absent such review, enforcement of the Guidelines would be left exclusively to the judgment of each sentencing court, and the congressional intent of achieving a degree of uniformity might be thwarted. *Id.* See also S.Rep. No. 225, 98th Cong., 2d Sess. 151 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334. It is essential to assure that the guidelines are applied properly and to provide

case law development of the appropriate reasons for sentencing outside of the guidelines. *Id.* Moreover, allowing a defendant to waive appeal of any and every sentence imposed in violation of the law would invite disrespect for the integrity of the courts and discredit the legitimacy of the sentencing process. *Id.*

On April 6, 2005, the Eleventh Circuit held Campbell knowingly and voluntarily waived the right to appeal. The court granted the Government's motion to dismiss and did not address Campbell's sentencing claims. There are three reasons why the appeal waiver clause is invalid: 1) the right to appeal a sentence cannot legally be waived under 18 U.S.C. § 3742(a) and public policy, 2) the record does not reflect that Campbell waived the right to appeal her sentence, and 3) the terms of the agreement are ambiguous as to whether "sentence" includes restitution.

On Issue I, the Eleventh Circuit entered a decision in conflict with the decision of courts in another United States court of appeals on the same manner. Specifically, there is a conflict among the circuit courts on whether waivers of appeal are per se invalid, and if the waivers are not per se invalid, when a review of waivers of appeal may be allowed. The District of Columbia's District Court agrees that appellate waivers are facially invalid. See *United States v. Raynor*, 989 F.Supp. 43 (D.C.D.C. 1998) and *United States v. Johnson*, 992 F.Supp. 437 (D.C.D.C. 1997). The court based its holdings on the fact that waivers of appellate rights can never be knowing; that the waivers undermine the uniform sentencing that is the goal of the sentencing guidelines; that they are contracts of adhesion, especially where the Government retains the right to appeal; and that the federal rules of criminal procedure already provide for waivers in specific situations. Despite the fact that *Johnson* was decided

almost eight years ago, the District of Columbia Court of Appeals has not had occasion to pass upon the issue. *United States v. Johnson*, 992 F.Supp. at 439, fn. 2.

Every other circuit that has considered enforcement of appellate waivers enforces at least some forms of appellate waivers. *United States v. Teeter*, 257 F.3d 14, 21-27 (1st Cir. 2001); *United States v. Hernandez*, 242 F.3d 110, 113-14 (2d Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 559-63 (3rd Cir. 2001); *United States v. Brown*, 232 F.3d 399, 402-06 (4th Cir. 2000); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992); *United States v. Fleming*, 239 F.3d 761, 764 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911, 916-18 (7th Cir. 2001); *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003); *United States v. Nguyen*, 235 F.3d 1179, 1182-84 (9th Cir. 2000); and *United States v. Hahn*, 359 F.3d 1315, 1325-28 (10th Cir. 2004).

The Eleventh Circuit's position is "A waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues – indeed, it includes a waiver of the right to appeal blatant error. Waiver would be nearly meaningless if it included only those appeals that border on the frivolous. . . ." *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999). On the other hand some circuits have declined to adopt a blanket rule prohibiting all review of waivers of appeal. *United States v. Khattak*, 273 F.3d 557 (3rd Cir. 2001) (miscarriage of justice analysis); *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001) (miscarriage of justice); *United States v. Brown*, 232 F.3d 399 (4th Cir. 2000) (identified two circumstances: if the sentence was "1) imposed in excess of the maximum penalty provided by law; or 2) based on a constitutionally impermissible factor such as race."); *United States v. Joiner*, 183 F.3d 635 (7th Cir. 1999) (ineffective assistance

of counsel); *United States v. Goodman*, 165 F.3d 169 (2d Cir. 1999); *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003) (miscarriage of justice); and *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (miscarriage of justice; ineffective assistance of counsel).

On Issue II, the Eleventh Circuit decided an important federal question in a way that conflicts with a relevant decision of this Court, or has decided an important question of federal law that has not been, but should be, settled by this Court. The court held that the record reflected that Campbell waived her right to appeal her sentence. However, this Court in *Boykin v. Alabama*, 395 U.S. 238, 241 (1969) held that a defendant must enter into a plea agreement knowingly and voluntarily. An examination of the record shows that the district court only advised Campbell that she was waiving the right to conviction, and she could not set aside her guilty plea. The court never confirmed Campbell knowingly and voluntarily waived her right to appeal her sentence. The court advised Campbell that she had the right to appeal the sentence if she believed the guidelines had been misapplied or the sentence is otherwise in violation of the law. The court then stated, "**you may waive those rights as part of your plea agreement**. If you have entered into a plea agreement which waives some or all of your rights to appeal the sentence, such waivers are generally enforceable."

Campbell prays this Court will grant her petition for certiorari and address the issue of whether the appeal waiver clause bars her from appealing her sentence. Campbell is including within her petition the sentencing issues that she has to show that she has valid substantive issues, and she prays that this Court will remand her case to the Eleventh Circuit to address those issues. In the

alternative, Campbell prays this Court will address the substantive issues as well. On the substantive issues, the court's enhancements for the underlying offense in Count I under 18 U.S.C. § 1341 violated the Sixth Amendment under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 2004 WL 1402697 (2004), and *United States v. Booker*, 125 S.Ct. 738 (2005) because the enhancements rested on factual findings by the judge instead of the jury. In addition, the court's restitution order, as applied to the defendant, is unconstitutional under *Apprendi*, *Blakely*, and *Booker*.

The district court also erred in relying solely upon hearsay in this case to calculate the victim's loss for sentencing purposes and for restitution and the fine, and the court erred in calculating restitution. Finally, the court erred in calculating the actual loss.

I. THE APPEAL WAIVER CLAUSE VIOLATES 18 U.S.C. § 3742(a).

The appeal waive clause violates 18 U.S.C. § 3742(a). Under the Sentencing Reform Act, a defendant may appeal her sentence only if it was imposed (1) in violation of the law, (2) due to a misapplication of the guidelines, (3) as an upward departure from the guidelines, or (4) for an offense for which there is no guideline and the sentence is plainly unreasonable. *United States v. Alamin*, 895 F.2d 1335, 1337 (11th Cir. 1990). This statute greatly expanded a defendant's right to appellate review. *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). Appellate review is essential because, absent such review, enforcement of the Guidelines would be left exclusively to the judgment of each sentencing court, and the congressional intent of achieving

a degree of uniformity might be thwarted. *Id.* See *United States v. Booker*, 125 S.Ct. 738 (2004).

Principles of contract law apply to plea agreements. *Allen v. Thomas*, 161 F.3d 667, 671 (11th Cir. 1998). Courts "presume that both parties to the plea agreement contemplated that all promises made were legal, and that the non-contracting 'party' who implements the agreement (the district judge) will act legally in executing the agreement." *United States v. Ready*, 82 F.3d 551, 559 (2nd Cir. 1996). "Terms that are lawful as written may not be given an illegal spin as part of an effort to curtail the obligation they create." *Id.* In addition, the *in pari delicto* doctrine denies judicial relief to parties to illegal contracts; this principle is based not on the solicitude for the defendant, but on concern for the public welfare. *Id.*

Under § 3742, a defendant can only appeal when she has been improperly sentenced. Dr. Campbell's sentence was imposed in violation of the law and the district court misapplied the guidelines (the law) to her case. However, the Government's sentencing appeal waiver prohibits Dr. Campbell from arguing that an improper sentence has occurred; hence, the Government has created an illegal contract, violated § 3742, and violated Congress' intent.

In fact, the District of Columbia's District Court agrees that appellate waivers are facially invalid: *United States v. Raynor*, 989 F.Supp. 43 (D.C.D.C. 1998) and *United States v. Johnson*, 992 F.Supp. 437 (D.C.D.C. 1997). The court based its holdings on the fact that waivers of appellate rights can never be knowing; that the waivers undermine the uniform sentencing that is the goal of the sentencing guidelines; that they are contracts of adhesion, especially where the government retains the right to

appeal; and that the federal rules of criminal procedure already provide for waivers in specific situations.

Federal courts have historically rendered invalid those actions that are so contrary to community standards that they are unconscionable. See *Fluor Western, Inc. v. G & H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971) (contracts of adhesion are unconscionable and against public policy) and *Crosby v. Gen. Tire & Rubber Co.*, 543 F.2d 1128 (5th Cir. 1976). Therefore, the appeal waiver clause must be voided.

II. THE RECORD DOES NOT REFLECT THAT THE DEFENDANT WAIVED THE RIGHT TO APPEAL HER SENTENCE, RESTITUTION, AND FINE.

In *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993), the court held that in order for the government to enforce a sentence appeal waiver it must show: (1) the district court specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, or (2) it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver.

Id. at 1351. In examining the record, the court noted that while the district court did advise Bushert that he waived his right to appeal the charges brought against him, the "court did not specifically address the issue of the sentence appeal waiver." *Id.* at 1352. Because of this failure, the court ruled, the agreement was not made "knowingly and voluntarily" in the spirit of *Boykin v. Alabama*, 395 U.S. 238, 241 (1969) (Plea agreements must be entered into by a defendant knowingly and voluntarily).

At the plea colloquy, the court confirmed that Campbell understood she waived her right to appeal her conviction, but the court failed to confirm that she knowingly, intelligently, and voluntarily waived the right to challenge her sentence, restitution, and the fine. Applying *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) and *Boykin v. Alabama*, 395 U.S. 238, 241 (1969), this is plain error. In addition, the record does not "manifestly reflect" that Campbell understood the waiver. In fact, the record reflects that the plea agreement is ambiguous (see Issue III), and the record reflects confusion by both Campbell and her attorney concerning the terms of the plea agreement and the application of the guidelines to her case. Both Campbell and her attorney were under the impression, based on the plea agreement and negotiations, that the amount of loss the government was going to use for her sentencing level was at $148,050. (R3-102-03). Campbell and her attorney were also under the impression that they would be given the opportunity to show why this amount should be less based on the legitimate studies that she had done. (R3-102-03).

The Government did not know where defense counsel got the $148,050 loss figure. Mr. Henry is a very decent man, and this is no attempt to disparage his integrity. However, these statements are crucial in showing defense counsel's and Campbell's state of mind. They thought they were pleading guilty to one deal while the Government thought they were pleading guilty to another one. After the court gave Campbell a 57 month sentence, she asked to be allowed to report later for her prison sentence because she had not made arrangements for child care, despite knowing since her October plea that she could go to prison. (R3-115-120). Campbell and her attorney **both** told the judge they thought she had a good chance to get probation. (R3-119-120).

Campbell thought she would get 15 points minus 3 for the acceptance of responsibility for 12. (R3-120).

Therefore, the record reflects that trial counsel misunderstood the terms of the plea agreement with the Government. Moreover, the district court either misapplied the amount of loss, or defense counsel misunderstood how the sentencing guidelines apply to the facts of Campbell's case. Hence, the record that does not "manifestly reflect" that Campbell understood the waiver. Because there is nothing in the record to satisfy either of the tests from *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993), the sentence appeal waiver must be ruled invalid. Finally, the District of Columbia's District Court agrees that appellate waivers are facially invalid because a defendant can never knowingly and intelligently waive a right to appeal or collaterally attack a sentence that has not been imposed; such a waiver is by definition uniformed and unintelligent and cannot be voluntary and knowing. See *United States v. Raynor*, 989 F.Supp. 43 (D.C.D.C. 1998) and *United States v. Johnson*, 992 F.Supp. 437 (D.C.D.C. 1997). Dr. Campbell's appeal shows the wisdom of holding that a defendant can never knowingly and intelligently waive a right to appeal or collaterally attack a sentence that has not been imposed.

III. THE PLEA AGREEMENT IS AMBIGUOUS AS TO WHETHER "SENTENCE" INCLUDES RESTITUTION.

If this Court holds the appeal waiver is effective, there remains a dispute as to its extent. "A contract term is ambiguous if it is reasonably susceptible to more than one interpretation." *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1359 (11th Cir. 1988). The subject of the plea agreement's waiver was Campbell's "sentence and conviction." Nowhere

in the document are the terms "restitution" and "sentence" used interchangeably. Nowhere in the document is "restitution" included within "sentence." Instead, the two terms are distinguished, and "sentence" is linked to the guidelines. Thus, when a reasonable person, having read the whole document, arrives at the waiver provision, he could justifiably conclude that "sentence and conviction" does not include restitution.

The agreement itself makes no mention of restitution, but ties "sentence" to the guidelines. The government agreed to recommend "a three-level reduction for acceptance of responsibility" and "that the defendant be sentenced at the low end of the guidelines." Plea.I(b)(1). Thus, a "sentence" is something mandated by the guidelines. Confirming the distinction between "sentence" and "restitution," restitution is only mentioned in a later paragraph, and then as something in addition to sentencing: "The parties agree that the court must consider ordering restitution *at* sentencing." *Id.* at I.(e). The two terms are distinguished, with "sentence" linked to the guidelines. In a later paragraph, the document describes the "Maximum Possible Sentences" as including "imprisonment, supervised release terms following imprisonment, fines, assessments, and other costs and losses." *Id.* at II.(1). Restitution is not mentioned in this list.

The following two paragraphs continue to distinguish between "sentence" and "restitution." The first of which describes the guidelines and states: "Congress has created Sentencing Guidelines which set a sentencing range in this case." *Id.* at II.(2). This links the sentence to the guidelines. The reasonable reader would conclude that a "sentence" is something imposed by the guidelines. But that distinguishes restitution, for restitution is determined

apart from the guidelines. See *United States v. Ready*, 82 F.3d 551, 559-560 (2d Cir. 1996) (holding that waiver of right to appeal "sentence" did not include restitution because, *inter alia*, document linked "sentence" to determination under guidelines and restitution is determined apart from guidelines); *United States v. Zink*, 107 F.3d 716, 717-718 (9th Cir. 1997); and *United States v. Ziadeh*, 2004 WL 1598781 (4th Cir. 2004) (unpublished). The next paragraph confirms this reading because it discusses restitution, while never mentioning the word sentence. Plea.II.(3).

Because the terms are used distinctly throughout the agreement, when the reasonable reader arrives at the waiver provision, and therein finds the phrase "conviction and sentence" he will conclude that "sentence" does not include restitution. Certainly the Government disputes this conclusion, but it remains a reasonable one. It is well accepted that "a plea agreement that is ambiguous 'must be read against the government.'" *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992). Therefore, the Court must accept the conclusion that the plea agreement excludes restitution from the waiver provision.

IV. THE DISTRICT COURT'S ENHANCEMENTS FOR THE UNDERLYING OFFENSE IN COUNT I UNDER 18 U.S.C. § 1341 VIOLATED THE SIXTH AMENDMENT BECAUSE THE ENHANCEMENTS RESTED ON FACT FINDINGS BY THE JUDGE INSTEAD OF THE JURY.

During the sentencing hearing, the district court relied upon facts neither found by a jury nor admitted by Campbell. The court made several factual findings under the Sentencing Guidelines to enhance Campbell's sentence for the underlying offense in Count I under 18 U.S.C.

§ 1341: 1) the calculation of the amount of loss attributable to the victim for the specific offense characteristics pursuant to U.S.S.G. § 2B1.1(b)(1)(I), 2) the increase by two levels pursuant to USSG § 2B1.1(b)(a) by which the offense involved a "sophisticated means" in paragraph 31, 3) the increase in two levels in paragraph 33 of the Report pursuant to U.S.S.G. § 3B1.1(b)(c) for adjustment for role in the offense, and 4) the increase in two levels for abuse of a private or public trust under U.S.S.G. § 3B1.3. Hence, the court's enhancements for the underlying offense in Count I under 18 U.S.C. § 1341 violated the Sixth Amendment under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Blakely v. Washington*, 2004 WL 1402697 (2004); and *United States v. Booker*, 125 S.Ct. 738 (2005) because the enhancements rested on factual findings by the judge instead of the jury. Hence, Campbell is entitled to relief, and she can only be sentenced to those facts admitted in her plea agreement and guilty plea under Count I.

V. THE DISTRICT COURT'S RESTITUTION ORDER IS UNCONSTITUTIONAL UNDER *APPRENDI*, *BLAKELY*, AND *BOOKER*.

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." In the pre-*Blakely*/*Booker* world, several Circuits upheld restitution orders against *Apprendi* challenges. See *United States v. Syme*, 276 F.3d 131, 158-159 (3rd Cir. 2002); *United States v. Beardon*, 274 F.3d 1031 (6th Cir. 2001); *United States v. Vera*, 278 F.3d 672 (7th Cir. 2002); and *United States v. Ross*, 279 F.3d 600 (8th Cir. 2002). That was wrong at the

time, and is even more wrong in light of *Blakely/Booker*. Restitution that rests on judicially determined facts violates the Sixth Amendment. Nothing post-*Booker* has changed. See, e.g. *United States v. Flaschberger*, 2005 WL 1274280 (7th Cir. 2005) and *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005).

First, under *Apprendi*, restitution, though itself without a maximum, is 'in addition to' the statutory maximum for the offense of conviction. In other words, the statute under which Campbell was convicted is the relevant statutory maximum and it did not provide for restitution. Thus, even if the restitution statute contains no limit to the amount, any amount would be in excess of the statutory maximum. Therefore, a jury must find the facts necessary for restitution. Second, under *Blakely* and *Booker* the statutory maximum is the maximum the court can impose based upon facts found by the jury or admitted by the defendant. A court cannot impose restitution unless it determines the identity of the victim and the amount of the loss. So a jury verdict that does not include these findings does not authorize restitution. Thus, in that situation, even if restitution is a part of every criminal statute, imposing restitution is exceeding the statutory maximum. If the jury's findings do not include the victim and the amount, then those findings do not authorize restitution. Thus restitution is in excess of the statutory maximum, and the facts necessary for its imposition must be submitted to a jury.

In Campbell's case, the court made its own findings in ordering restitution, and so violated the Sixth Amendment. Campbell admitted to Count I of the indictment, which does not contain any estimation of the total loss to the victim. Count I contained no more than an allegation

that Campbell was to receive $400 for each completed study and that Campbell reported 407 completed studies. Count I charged Campbell with submitting one false study. The most that a court could infer that Campbell had cost the victim was $400 for that one false study. Any other loss was a disputed matter. In fact, at the plea conference Campbell explicitly contested inferences about the amount of financial loss to the victim. She later contested the amount at the sentencing hearing. Because Campbell only admitted to causing $400 in losses, the court based the $925,774.61 restitution order on its own factual findings. (R3-105-107). Such judicial fact-finding violates the Sixth Amendment. Hence, restitution must be reduced to that supported by Campbell's own admissions prior to the sentencing hearing.

VI. THE DISTRICT COURT ERRED IN RELYING SOLELY UPON HEARSAY IN THIS CASE TO CALCULATE THE VICTIM'S LOSS FOR SENTENCING PURPOSES AND FOR RESTITUTION AND THE FINE.

The burden of proof for establishing restitution is upon the Government by a preponderance of the evidence. *United States v. Bourne*, 130 F.3d 1444, 1447 (11th Cir. 1997). In determining the amount of restitution, the Eleventh Circuit and the Sentencing Guidelines permit a sentencing court to consider hearsay evidence that bears "minimal indicia of reliability." *Id.* and U.S.S.G. § 6A1.3. See *United States v. Hairston*, 888 F.2d 1349, 1353-1354 (11th Cir. 1989) and *Doe v. Lee*, 220 F.Supp.2d 1307, 1312-13 (M.D.Ala. 2002).

The FDA Division for Scientific Investigations decided in December of 2002 it would not use Campbell's data in

the ultimate decision-making process when Aventis finally submitted its data for approval for the Keteck. (R3-18-19). On January 24, 2003, the anti-infective division of the FDA made the final decision that Campbell's data was unreliable and would not be utilized by the FDA when Aventis submitted its data for approval. (R3-18-19). "Aventis would not have been able to include the defendant's test site in their study analysis regardless of the number of falsified study subjects. In other words, even if only one of the study subjects was false, the defendant's test site would have been removed from the final study analysis." (R1-44).

Thomas Valen and his law firm were hired by Aventis to assist in the FDA investigation. (R3-28-29). Valen asked people at the company to gather information and documents for him for the sentencing hearing. (R3-29). Government Exhibit number 4 is a three page letter that Valen prepared and sent to special agent West of the FDA. (R3-29). Attached to the letter are two memos plus supporting documents that people at Aventis gave to Valen. (R3-29,48). The letter concerns Aventis' loss and what Aventis might be entitled to receive through restitution. (R3-29).

Valen spoke with Nadine Grethe who is the study manager, and he spoke with Bruno Leroy who is the Keteck Project Leader Globally. (R3-30). Grethe sent a memo and documents, which is Exhibit 1 to Government Exhibit 4, and Leroy's memo is Exhibit 2 to Government Exhibit 4. (R3-29). The Government asked Valen if he could relate Aventis' expenses with Campbell. (R3-31). Valen said that he could base his testimony on the conversations he had with Grethe and Leroy and the documents provided by Grethe. (R3-31). Defense counsel objected to Valen's testimony on the grounds that the Government had the burden of proof by a preponderance and hearsay

could not meet this burden. (R3-31). Later, defense counsel again objected to the admission of the hearsay evidence, again objected that none of these documents were under Valen's supervision and control, that the evidence was not competent, that the Government had the burden of proof by a preponderance, and moved to exclude the hearsay evidence as far as restitution was concerned. (R3-80-81).

Valen admitted that he did not know whether Campbell ever received the drugs that had been shipped to her office, the drugs for which Aventis was seeking $69,062.16 in compensation. (R3-42-43). Valen admitted that on many of the important issues in Campbell's case, he had no knowledge whatsoever, not even from hearsay. Valen's testimony also shows that both he and the Aventis employees made several assumptions and estimations. When Valen testified about the $4,283.67 in costs, he testified it was his "**understanding**" that this amount reflected the copy charges that Campbell had asked to be reimbursed for. (R3-34). Valen further testified, "I ***think*** there was a special bottle of Augmentin that needed to be purchased ***apparently***, and she asked Aventis to pay that." (R3-34).

The Government also had Valen cover restitution. (R3-37). Valen testified that Leroy prepared a memorandum, which is Exhibit 2 attached to Government's Exhibit 4. (R3-37). The government then asked, "Would you review what Dr. Leroy stated in there were expenses that were incurred by Aventis that is a consequence of Dr. Campbell's actions in connection with the Keytek study?" (R3-37). Valen answered: "Yes. I asked him to calculate **to the extent he could or otherwise estimate**, but gather information as to other losses to Aventis as a result of Dr. Campbell's fraud, and he summarized that. I talked to him about it but he also summarized it as exhibit two." (R3-37).

The biggest area of hearsay that failed to meet the indicia of reliability concerned Quantic's investigation of Campbell's studies. Valen did not know the details of the Quantic review, did not know what Quantic did, and did not know whether Quantic attempted to extinguish good from bad test subjects. (R3-43-44). Valen stated, "I don't know precisely what Quantic did. They were asked to analyze the sites. They were asked to – I am not even a hundred percent sure of exactly what they were asked to do. I know they were asked to do a review of 5 sites. I don't know precisely what Quantic did." (R3-44). The court asked the date of the Quantic review, and Valen conceded, "I don't know the precise date." (R3-46). Valen knows Quantic did the work around the spring of 2003. (R3-46). He thinks it was finished in early summer, but he "couldn't put dates on it. It was after the approvable letter." (R3-46). Valen also did not know whether the FDA requested Aventis to obtain Quantic. (R3-46). The FDA had questions with five sites, and they asked those sites to be evaluated. (R3-46).

Valen was asked if it was reasonable to conclude that, since the FDA had already stated that Campbell's 407 studies were to be taken out and could not be used, there was no need to review Campbell's studies by Quantic. (R3-44). Valen responded, "I don't know what the FDA wanted. I don't know what Quantic was asked to do. That's beyond any role that I had." (R3-44). Valen testified that, **as he understands it**, Aventis submitted study data to the FDA that included data from Campbell's site. (R3-37). Valen **believes** the dollar figure attributable to Dr. Campbell to be $639,527.25. (R3-38-39). Valen responded, "**I suspect – I don't specifically recall, but I suspect** when I wrote the letter I reversed those two numbers. So there is a

roughly $50, $40 to $50 difference." (R3-39). This amount is based on what Leroy **thought** conservatively could be attributed to Campbell. (R3-43). Valen conceded that the method of calculating the amount in which Campbell had been paid was $400 per subject on a completed subject basis. (R3-45). Valen then stated, "If your question is should she have been paid for – if you could somehow distinguish good subjects from bad subjects, I haven't analyzed the contract in that regard. I certainly wouldn't think so, but I don't know." (R3-45).

Agent Robert West got back on the stand and testified that, based on his conversation with a FDA employee, after the FDA had determined Campbell's studies contained fraudulent information, the FDA asked Aventis to look at four additional sites that the FDA had concerns with. (R3-80-81). The FDA did not ask Aventis to use Quantic but it did say that Aventis needed to look closely at those four cites and Campbell's site. (R3-80-81). West confirmed that the FDA told Aventis in January 2003 that it was not going to utilize Campbell's studies. (R3-82). The court then asked why Aventis asked Quantic to make an investigation of Campbell's studies, and West testified that Aventis still had a right to object to the FDA's decision not to utilize Campbell's studies. (R3-82). Aventis had to submit its studies to the FDA with and without Campbell's studies, but the FDA was not taking her studies into consideration. (R3-82-83).

The biggest problem with this hearsay testimony by Valen and West concerns why Aventis conducted a $639,527.25 study of Campbell's studies because this study occurred after the FDA on two occasions had said that it was not going to use Campbell's studies. The district court agreed that "maybe some (patient studies) were good,

maybe some weren't," but the court refused to take into consideration the good studies because the company no longer was able to utilize any of the information they got from her so the studies might as well have never been done. If Campbell's studies might have well never been done, the same can be said for Quantic's study of her studies.

Moreover, Valen admitted the Quantic study occurred after the FDA had issued an approvable letter in January of 2003. Why would it be necessary to conduct a further study if the approvable letter had already been issued? The problem with this testimony is no one can tell whether the Quantic study was conducted to assist in Campbell's prosecution, which is clearly not recoverable in restitution. Therefore, the court erred in relying solely upon hearsay in this case to calculate the victim's loss for sentencing purposes and for restitution and the fine. At a minimum, Aventis is not entitled to restitution in the amount of $639,527.25 for the Quantic study.

VII. THE DISTRICT COURT ERRED IN CALCULATING RESTITUTION.

The burden of proof for establishing restitution is upon the government by a preponderance of the evidence. *United States v. Bourne*, 130 F.3d 1444, 1447 (11th Cir. 1997). In determining the amount of restitution, the Eleventh Circuit and the Sentencing Guidelines permit a sentencing court to consider hearsay evidence that bears "minimal indicia of reliability." *Id.* and U.S.S.G § 6A1.3. A federal district court has no inherent authority to order restitution, and may do so only as explicitly empowered by statute. *United States v. Dickerson*, 370 F.3d 1330,

1334 (11th Cir. 2004). The Mandatory Victims Restitution Act obligates district courts to order restitution in certain cases. 18 U.S.C. § 3663A. *Id.* The statute defines the victim as anyone "proximately harmed as a result of the commission of an offense." 18 U.S.C. § 3663A(a)(2). However, the district court must find that the victim's losses resulted "directly" from the defendant's criminal conduct in the course of a scheme and the harm must be closely related to the scheme rather then tangentially linked. *Id.* Hence, the amount of restitution is measured, like compensatory damages, solely by the harm done to the victim. See 18 U.S.C. § 3663A(b)(1)-(b)(4); *United States v. Quillen*, 335 F.3d 219, 221 (3rd Cir. 2003) ("[R]estitution must be limited to an amount pegged to the *actual* losses suffered by the victims of the defendant's criminal conduct, and based upon *losses directly resulting* from such conduct.").

First, a defendant cannot be compelled to pay restitution for conduct committed outside the scheme, conspiracy, or pattern of criminal behavior underlying the offense of the conviction. See *United States v. Dickerson*, 370 F.3d 1330, 1341 (11th Cir. 2004) and 18 U.S.C. § 3663A.

The indictment to which Campbell pled guilty alleged that she pursued a scheme to defraud Aventis from Nov. 7, 2001, through March 2002. The FDA's Division for Scientific Investigations decided in December of 2002 it was not going to use Campbell's data in the ultimate decision-making process when Aventis finally submitted its data for approval for the Keteck. (R3-18-19). Then, on January 24, 2003, the anti-infective division of the FDA made the final decision that Campbell's data was considered unreliable and would not be utilized by the FDA when Aventis submitted its data for approval. (R3-18-19). "Aventis would not have been able to include the defendant's test site in

their study analysis regardless of the number of falsified study subjects. In other words, even if only one of the study subjects was false, the defendant's test site would have been removed from the final study analysis." (R1-44).

Valen did not know the details of the Quantic review, did not know what Quantic did, and did not know whether Quantic attempted to extinguish good from bad test subjects. (R3-43-44). Valen stated, "I don't know precisely what Quantic did. They were asked to analyze the sites. They were asked to – I am not even a hundred percent sure of exactly what they were asked to do. I know they were asked to do a review of 5 sites. I don't know precisely what Quantic did." (R3-44). The court asked the date of the Quantic review, and Valen conceded, "I don't know the precise date." (R3-46). Valen knows Quantic did the work around the spring of 2003. (R3-46). He thinks it was finished in early summer, but he "couldn't put dates on it. It was after the **approvable letter**." (R3-46). **The FDA issued an approvable letter to Aventis in January 2003.** (R3-38).

Hence, Campbell cannot be compelled to pay restitution for conduct committed outside the scheme, conspiracy, or pattern of criminal behavior underlying the offense of the conviction. This Issue and Issue VI show the government failed to meet its burden of proof that the Quantic study resulted "directly" from the defendant's criminal conduct in the course of a scheme and that the harm was closely related to the scheme rather then tangentially linked. At a minimum, Aventis is not entitled to restitution in the amount of $639,527.25 for the Quantic study.

VIII. THE DISTRICT COURT ERRED IN CALCULATING THE ACTUAL LOSS.

Under the contract terms, Campbell was paid $400 for each volunteer who completed the study for the safety and effectiveness of Keteck. (R4-16; R3-8-9). Campbell was paid $400 per subject on a completed subject basis. Campbell submitted 407 studies, some of which were valid and some of which were fraudulent. (R3-105-07). The Government argued that the fraudulent studies rendered all 407 – including the valid studies – worthless. Based on this argument, the court calculated the loss as the amount paid for all 407 studies.

The Government and the PSR submitted that one false study invalidated all the studies, so that the actual loss is the total amount paid for all 407 studies. That premise may be true, but the conclusion does not necessarily follow. In determining the amount of actual loss, the issue is what amount of loss Campbell *should have known* would result from the fraudulent studies. "[A]ctual loss means the reasonably foreseeable pecuniary harm that resulted from the offense." U.S.S.G. § 2B1.1, app. note 3(A)(i). That is, "the pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." *Id.*

"[T]he government bears the burden of supporting its loss calculation with 'reliable and specific evidence.'" *United States v. Renick*, 273 F.3d 1009, 1025 (11th Cir. 2001). Loss is the amount "that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." U.S.S.G. § 2B1.1, app. note 3(A)(iv). The Government did not provide "reliable and specific evidence" that the defendant knew or should

have known that one false study would invalidate all the studies. Thus, the actual loss cannot include the valid studies, even if the fraudulent studies later rendered them worthless.

Moreover, the application notes provide that in calculating the loss, the "loss shall be reduced by . . . the fair market value of the . . . services rendered . . . to the victim . . . *before the offense was detected.*" U.S.S.G. § 2B1.1, app. note 3(E)(i) (emphasis added). Here, before the offense was detected, no one knew that the entire study could be worthless. Thus, prior to detection, the valid studies had a fair market value, and the court should have subtracted the good studies from the bad ones in its loss calculation.

CONCLUSION

The petition for certiorari should be granted.

RESPECTFULLY SUBMITTED, this the 5th day of July.

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No. _____

In The
Supreme Court of the United States

MARIA ANNE KIRKMAN CAMPBELL,
a.k.a. Anne Kirkman Campbell,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11693
Non-Argument Calendar

D. C. Docket No. 03-00437-CR-CO-M

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARIA ANNE KIRKMAN CAMPBELL,
a.k.a. Anne Kirkman Campbell

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed April 6, 2005)

BEFORE: BLACK, HULL and WILSON, Circuit Judges.

PER CURIAM:

Maria Anne Kirkman Campbell appeals her sentence imposed after pleading guilty to fraud and swindles by mail, in violation of 18 U.S.C. §§ 1341, 2. Campbell challenges the validity of her appeal waiver in various respects and raises several claims regarding her sentence. The Government has filed a motion to dismiss the appeal, seeking to enforce the appeal waiver provision contained

in Campbell's plea agreement. We grant the Government's appeal.

I. DISCUSSION

A. *Whether the appeal waiver clause is an illegal agreement that is unenforceable and violates 18 U.S. C. § 3742(a).*

Campbell first argues the appeal waiver clause violates 18 U.S.C. § 3742(a). Campbell maintains allowing a defendant to waive her right to appeal "any and every sentence imposed in violation of the law would invite disrespect for the integrity of the courts and discredit the legitimacy of the sentencing process." Campbell contends the plea agreement is an illegal contract because it prevents her from appealing her illegal sentence. Consequently, Campbell submits the appeal waiver clause must be voided.

Appeal waivers are valid if they are entered into knowingly and voluntarily. *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). "A waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues indeed, it includes a waiver of the right to appeal blatant error." *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999). Because Campbell knowingly and voluntarily waived her right to appeal her sentence as discussed below, we reject this claim.

B. *Whether Campbell voluntarily and knowingly waived the right to appeal.*

Campbell next argues she did not voluntarily and knowingly waive her right to appeal her sentence, restitution, and fine. First, Campbell maintains that, as in

Bushert, the district court never specifically addressed the sentence appeal waiver at the colloquy, but only advised her that she was waiving the right to appeal her conviction. Campbell also asserts the court failed to inform her that restitution was mandatory, but only advised her restitution "may apply." Further, Campbell contends the record fails to reflect she otherwise understood the appeal waiver because the plea agreement is ambiguous. Campbell also appears to argue the waiver was not voluntary because her sentence exceeded her expectations.

We review the validity of an appeal-of-sentence waiver provision de novo. *United States v. Weaver*, 275 F.3d 1320, 1333 n.21 (11th Cir. 2001). As noted above, sentence appeal waivers are valid if they are entered into knowingly and voluntarily. *Bushert*, 997 F.2d at 1350. To show a sentence appeal waiver is knowing and voluntary, the government must show either (1) the district court specifically questioned the defendant about the sentence appeal waiver during the plea colloquy, or (2) the record clearly shows that the defendant otherwise understood the full significance of the waiver. *Id.* at 1351.

Bushert is distinguishable. In that case, although the plea agreement informed Bushert he was waiving his right to appeal his sentence by entering into the plea agreement, the district court stated at the plea colloquy that under certain circumstances he could appeal his sentence and did not specifically discuss the sentencing appeal waiver provision contained in the plea agreement. *Bushert*, 997 F.2d at 1352. This Court concluded although it was "true that even under the terms of the sentence appeal waiver, Bushert could appeal his sentence under some circumstances," the district court's statement did not

clearly convey to Bushert he was giving up his right to appeal under most circumstances. *Id.* at 1352-53.

Here, the district court made no such statement, but simply failed to mention Campbell was waiving her right to appeal her sentence, although the court did advise her that she was waiving her right to appeal her conviction. Further, Campbell was advised in her plea agreement she was waiving her right to appeal her sentence, the district court specifically referenced the appeal waiver provision in the Rule 11 colloquy, and Campbell stated she had read the terms of the agreement before she signed it and was aware the appeal waiver provision was contained within the agreement. See *Weaver*, 275 F.3d at 1323, 1333 (holding an appeal waiver was effective where the district court established at the Rule 11 hearing the defendant had read and understood "every page and every word" of the plea agreement). Moreover, the district court advised Campbell if the Court imposed a sentence greater than she anticipated, that would not provide a basis for Campbell to move to set aside her guilty plea.

As to Campbell's claim she did not knowingly and voluntarily waive her right to appeal the restitution order because the court did not advise her restitution was mandatory, this claim is belied by the record. At the plea colloquy, although the court did, at one point, misstate that restitution may be required, the court previously had informed Campbell that "restitution will apply." Further, Campbell's plea agreement clearly advised Campbell of the mandatory nature of restitution, and she stated at the plea colloquy she had read the terms of the agreement before signing it.

Finally, although Campbell makes a conclusory argument she did not knowingly and voluntarily waive the right to appeal her fine, she makes no actual argument regarding her fine. Thus, this issue is abandoned. *See Rowe v. Schreiber*, 139 F.3d 1381, 1382 n.1 (11th Cir. 1998) (refusing to reach an issue mentioned in passing in the brief filed by counsel because the issue had no supporting argument or discussion).

C. *Whether the Government breached the plea agreement, rendering the appeal waiver invalid*

Campbell next argues the Government breached the plea agreement by seeking an obstruction-of-justice enhancement after agreeing in the plea agreement to recommend she be sentenced at the low end of the guidelines. Campbell further contends the Government did not recommend she be sentenced at the low end of the guideline range as agreed.

Whether the government has breached a plea agreement is a mater of law we review de novo. *United States v. Mahique*, 150 F.3d 1330, 1332 (11th Cir. 1998). However, if given the opportunity to object, the defendant's failure to object after imposition of the sentence bars any objections to the sentence absent manifest injustice. *Id.* We equate manifest injustice with a review for plain error. *Id.* In *United States v. Olano*, 113 S. Ct. 1770, 1776 (1993), the Supreme Court delineated the following four elements required to establish plain error: (1) error; (2) that is plain and obvious; (3) which affected substantial rights; and (4) seriously affected the "fairness, integrity, or public reputation of the judicial proceedings." The third prong of the plain error test requires that an error have affected the outcome of the district court proceedings. *United States v.*

Rodriguez, 398 F.3d 1291, 1299 (11th Cir. 2005). In regard to the third prong, "[i]t is the defendant rather than the [g]overnment who bears the burden of persuasion with respect to prejudice." *Id.*

The government is bound by a material promise that induces a defendant to plead guilty. *Santobello v. New York*, 92 S. Ct. 495, 499 (1971). "[W]hether the government violated the agreement is judged according to the defendant's reasonable understanding at the time [s]he entered [her] plea. *United States v. Taylor*, 77 F.3d 368, 370 (11th Cir. 1996).

1. *Obstruction of Justice*

As to Campbell's claim the Government breached the plea agreement by moving for the obstruction-of-justice enhancement when it had agreed to recommend that she be sentenced at the low end of the guidelines range, the plea agreement is silent as to the Government's right to seek an obstruction-of-justice enhancement. Further, when the parties entered into the plea agreement, the facts giving rise to the obstruction-of-justice enhancement had not occurred, so the applicability or non-applicability of the enhancement was not a term which induced Campbell into entering into the agreement. Finally, in the plea agreement, the Government reserved the right to "to make any facts or evidence it deems relevant to sentencing known to the Court."

2. *Low end of the guidelines*

The Government's failure to seek a sentence at the low end of the guidelines is reviewed for plain error because, despite being given the opportunity to do so,

Campbell did not object after the Government failed to recommend a sentence at the low end of the guideline range nor did she make any request to that effect herself. *See Olano*, 113 S. Ct. at 1776.

Campbell has not established that plain error exists with regard to the Government's failure to recommend a sentence at the low end of the guidelines range. Although the Government did not explicitly request a sentence at the low end of the guidelines at the sentencing hearing, both the plea agreement and the PSR stated the Government was recommending a sentence at the low end of the guidelines. Because these documents were before the district court, we cannot say the error affected Campbell's substantial rights. Campbell has not met her burden of showing she was prejudiced because the Government did not explicitly request a sentence at the lower end of the guidelines at sentencing.

D. *Whether the term sentence includes restitution*

Campbell argues the plea agreement is ambiguous as to whether the term "sentence" includes restitution. As previously noted, whether a defendant effectively waived his right to appeal his sentence is a question of law we review de novo. *Weaver*, 275 F.3d at 1333 n.21. We recently set out a two-step process to evaluate the meaning of any disputed terms in a plea agreement:

> First, is the language ambiguous, or not? If it is, we will consider extrinsic evidence of the parties' intent in arriving at an interpretation of the agreement's language . . . ; otherwise, we are limited to the unambiguous meaning of the language in the agreement. Second, given our interpretation of the language, we must decide

> whether to enforce the agreement, keeping in mind that "the validity of a bargained guilty plea depends finally on the voluntariness and intelligence with which the defendant and not his counsel – enters the bargained plea."

United Sates v. Copeland, 381 F.3d 1101, 1106 (11th Cir. 2004). "When a plea agreement is ambiguous, it 'must be read against the government.'" *Id.* at 1105-06 (citation omitted).

The plea agreement is not ambiguous as to whether the term "sentence" includes restitution. Campbell specifically agreed "*a sentence* could include imprisonment supervised release terms following imprisonment, fines, assessments, and *other costs and losses*" (emphasis added). Further, the restitution provision of the plea agreement which provided "[t]he court must consider ordering restitution," was under the heading "Possible Sentences and the Guidelines." At the plea colloquy, Campbell stated she read the entire agreement before signing it, including the appeal waiver provision. The appeal waiver provision provided Campbell waived her right to appeal her conviction(s) and *sentence* (emphasis added). Also, there is no indication in the record the parties intended for restitution to be excluded from the appeal waiver. Because Campbell knowingly and voluntarily waived the right to appeal her sentence, she has waived her right to challenge the amount of restitution.

E. *Whether the clause in Campbell's plea agreement that prohibits her from challenging her conviction and sentence pursuant to 28 U.S.C. § 2255 is illegal and unenforceable.*

Campbell next argues if she is unsuccessful with the instant appeal, the Government might also assert she waived her right to file § 2255 claims concerning the voluntariness of her guilty plea and counsel's performance.

The judicial power of federal courts is restricted to cases and controversies. *Flast v. Cohen*, 88 S. Ct. 1942, 1949 (1968). No justiciable controversy is presented when the parties ask for an advisory opinion. *Id.* at 1950. We have explained the case or controversy requirement of Article III of the U.S. Constitution includes a "ripeness requirement [that] prevents the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999) (internal brackets omitted).

Here, Campbell has not yet filed a § 2255 motion, but seeks an advisory opinion from this Court as to the potential effect of the appeal waiver provision on her ability to raise certain issues in a future collateral proceeding. Because (1) no justiciable case or controversy exists when a party seeks an advisory opinion, and (2) Campbell merely seeks an advisory opinion regarding the effect of her appeal waiver provision on her ability to file a future collateral proceeding, we decline to reach the merits of this claim.

II. CONCLUSION

Because Campbell knowingly and voluntarily waived the right to appeal her conviction and sentence via a written plea agreement, and the sentencing claims raised in the instant appeal do not fall within an exception to the appeal waiver,[1] we hereby GRANT the Government's motion to dismiss.

APPEAL DISMISSED.

[1] Because we find the appeal waiver valid and enforceable, we do not address Campbell's sentencing claims.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11693-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARIA ANNE KIRKMAN CAMPBELL,
a.k.a. Anne Kirkman Campbell

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

BEFORE: BLACK, HULL and WILSON, Circuit Judges.

BY THE COURT:

Appellant's motion for rehearing . . . construed as appellant's motion for reconsideration of this Court's Order of April 6, 2005, is DENIED.

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18 U.S.C.A. § 1341. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place of which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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18 U.S.C.A. § 1342. Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any

letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both.

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18 U.S.C.A. § 3663A. Mandatory restitution to victims of certain crimes.

(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

(i) the greater of –

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary childcare, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c) (1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

(A) that is –

(i) a crime of violence, as defined in *section 16*;

(ii) an offense against property under this title, or under *section 416(c)* of the Controlled Substances Act (*21 U.S.C. 856(a)*), including any offense committed by fraud or deceit; or

(iii) an offense described in *section 1365* (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph

(1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that –

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) an order of restitution under this section shall be issued and enforced in accordance with *section 3664*.

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18 U.S.C.A. § 3664. Procedure for issuance and enforcement of order of restitution.

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules ~~applicable to~~ proceedings under this section.

(d) (1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable –

(A) provide notice to all identified victims of –

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to

the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f) (1) (A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to *section 3572*, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of –

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3) (A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of –

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g) (1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j) (1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in –

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent, provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of

the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m) (1) (A) (i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registration, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that –

(1) such a sentence can subsequently be –

(A) corrected under *Rule 35 of the Federal Rules of Criminal Procedure* and *section 3742* of *chapter 235* of this title;

(B) appealed and modified under *section 3742*;

(C) amended under *subsection (d)(5)*; or

(D) adjusted under *section 3664(k)*, *3572*, or *3613A*; or

(2) the defendant may be resentenced under *section 3565* or *3614*.

(p) Nothing in this section or *sections 2248*, *2259*, *2264*, *2327*, *3663*, and *3663A* and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

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18 U.S.C.A. § 3742. Review of a sentence

(a) Appeal by a defendant – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under *section 3563(b)(6)* or *(b)(11)* than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government. – The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under *section 3563(b)(6)* or *(b)(11)* than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements. – In case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure –

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreements.

(d) Record on review. – If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals –

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration. – Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that –

(i) does not advance the objectives set forth in *section 3553(a)(2)*; or

(ii) is not authorized under *section 3553(b)*; or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section *3553(a)* of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of *section 3553(c)*; or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition. – If the court of appeals determines that –

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand. – A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with *section 3553* and with such instructions as may have been given by the court of appeals, except that –

(1) In determining the range referred to in subsection *3553(a)(4)*, the court shall apply the guidelines issued by the sentencing Commission pursuant to *section 994(a)(1) of title 28, United States Code*, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with

any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that –

(A) was specifically and affirmatively included in the written statement of reasons required by *section 3553(c)* in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge. – An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range. – For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions. – For purposes of this section –

(1) a factor is a "permissible" ground of departure if it –

(A) advances the objectives set forth in *section 3553(a)(2)*; and

(B) is authorized under *section 3553(b)*; and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).